TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

Appellants filed their Substitute Brief, (hereinafter "App. Sub. Br.") thereby limiting the inquiry in this appeal to those issues briefed, all other issues being abandoned. Mo. R. Civ. P. 83.08(b). There are three (3) issues for this Court's consideration, whether the Trial Court erred:

1. when the Trial Court set the price for the partition sale without conducting a public judicial sale in accordance with the mandatory requirements of Mo. R. Civ. P. 96.01 *et seq*. and Chapter 528;
2. when the Trial Court refused to appoint a receiver over the litigants' partnership property when presented with substantial evidence of wrongful conduct and self-dealing by the managing partner, Carpenter; and,
3. when the Trial Court entered judgment in favor of defendants on the claims of breach of fiduciary duty, conversion and constructive trust because the judgment was against the weight of the evidence and erroneously applied the law.

Respondents' Brief, (hereinafter "Resp. Sub. Br.") focuses on various alleged technical and procedural points and, in a number of respects, raises issues which are not germane to the issues now before this Court, pursuant to appellants' Substitute Brief. For this reason appellants will address in this Reply only those issues raised in respondents' Substitute Brief that are both germane to the issues before this Court and which are arguably meritorious.

FACTUAL STATEMENT

Respondents' additional facts add nothing of significance. However, in some important respects respondents misstate key facts and those are addressed here. Respondents blend various procedural matters and argument in their pages 13-26 of the "Statement of Facts" not in compliance with Mo. R. Civ. P. 84.04(c). For the sake of order in the Reply Brief, the following discussion addresses each point meriting a response.

At page 10, respondents attempt to summarize provisions of the Broadway-Washington Partnership Agreement, and say that it both authorized the managing general partner to "charge for services" rendered, and restricted the other partners from doing so. In fact, the key language in the partnership agreement says just the opposite. Article V, paragraph 4 of the Partnership Agreement (Appellants Appendix (App. Apx.) A40-41) states, in pertinent part:

> 4. Assistance From Partners. . . . None of the Partners hereto shall make any charges against the Partnership for any ordinary overhead expenses or for time or effort which may be expended in connection with the performance of the functions of the Partnership by any such Partner, its officers or employees, except such officers or employees of a partner who, through designation by the Manager, may be employed by the Partnership in actually carrying on its functions. . .

To the extent respondents attempt to interpret paragraph 4 to mean "Manager" was entitled to the money, the term "Manager" in this context refers to the separate "Management Agreement" (reproduced in App. Apx. A57-64) between Broadway-Washington Associates, Ltd. and Allan Carpenter's corporation "Carpenter-Vulquartz Redevelopment Corp." Appellants described this in App. Sub. Br. at 13 and 19-20. "Manager" is a defined term in the partnership agreement and refers to Carpenter-Vulquartz Redevelopment Corp.'s role under the separate "Management Agreement" (set forth in preceding paragraph, top of LF 219 or App. Apx. A39). The "Management Agreement" only applied to specific "Projects" as defined therein. John Carpenter, Allan's son, testified that it was never triggered because there never was a "Project". *See* App. Sub. Br. at 20.

Respondents also combine, impermissibly, a fact discussion with argument when, at page 11, they assert Carpenter was merely paying himself the agreed percentage of revenue attributable to the 63% of the land he bought in 1989. The "stripping cash" point advanced by appellants addresses Carpenter taking all the remaining cash as well. App. Sub. Br. at p. 24-25.

The fact that Allan Carpenter is deceased is immaterial to the issues involving other respondents and is immaterial with respect to the errors created at the Trial Court level. His actions created liability for all the Carpenter family entity defendants. The involvement of all defendants/respondents listed at Resp. Sub. Br. at 14, directly or by way of vicarious liability, is adequately addressed. Nowhere in their brief do respondents question the vicarious liability of those defendants/respondents who were partners with

Allan Carpenter in various entities such as Golden Gateway Building Co., Mortimer Fleishhacker, Fleishhacker Properties, and St. Francis Associates L.P.

Appellants' discussion of the joint venture is set forth in App. Sub. Br. at 13-15. Respondents misstate the record when, at page 13, they claim Fredericks testified there were "no shared profits" in the venture. One may search the cited transcript pages in vain for any such admission, but will find instead testimony in support of the joint venture as argued herein.

The counterclaim for judicially supervised winding-up of Broadway-Washington is not before the Court. It is not irrelevant, however, because as Appellants explain at pages 22-23, after allegedly dismissing that count[1] Carpenter and his counsel filed the "secret lawsuit" and confessed a judgment in Carpenter's favor for the very items that the trial court would have addressed had the counterclaim not been dismissed.

[1] Respondents allege that their claim for winding up was dismissed in open court on March 19, 1999. Resp. Sub. Br. at 64. A review the transcript of the March 19th hearing does not reveal counsel for respondents, Rhonda Smiley, dismissing the claim for winding up. *See* TR 3/19/99, 19-26. Judgment of dismissal on this claim was entered on October 17, 2003. LF Case No. WD 63485, 001-003.

ARGUMENT

I. The Trial Court erred in entering the Final Order and Judgment of Partition of real estate because:

A. the Trial Court failed to follow the procedure established by Mo. R. Civ. P. 96 in that the Trial Court set the price for the real estate without conducting a public judicial sale in accordance with the requirements of Rule 96 and Mo. Rev. Stat § 528.010 *et seq.*, and exceeded its authority by setting a price suggested by defendants but not set by bid at a sheriff's sale pursuant to Rule 96.

This is a case of first impression with respect to whether trial courts have authority to determine the price for partitioned real property, or whether Mo. R. Civ. P. 96 and Mo. Rev. Stat. §528.010 *et seq*. mandates the partition price be established pursuant to a court ordered contemporaneous public judicial (sheriff's) sale. Appellants contend trial courts lack authority to determine the price of partitioned real property, and that price may only be established by means of a contemporaneous public judicial sale conducted in the manner specifically set forth in Rule 96 and Chapter 528. Respondents attempt to justify the Trial Court arbitrarily selecting a price, and argue that the Trial Court had some undefined latitude to deviate from the mandatory provisions of Rule 96.

In summary, respondents argue that:

A. appellant does not complain of or prove prejudice from the Final Judgment of Partition;

B. there was substantial compliance with Rule 96 by means of a lawful judicial sale conducted in the trial judge's chambers;

C. appellants' interest in the property at issue was only ten percent and therefore *de minimis,* thereby permitting a deviation from Rule 96; and,

D. respondents are entitled to an award of $231,305 in attorney's fees.

1. The Trial Court Impermissibly Deviated From Rule 96

The key facts leading up to the Final Order and Judgment of Partition show why the Trial Court's actions were a prejudicial deviation from Rule 96 and Chapter 528. The key dates and events were:

April 15, 1999	Interlocutory order for public judicial sale of tenancy-in-common property
June 17, 1999	Judicial (sheriff's) sale pursuant to the Interlocutory Order of April 15, 1999, bringing $3.04 per sq./ft.
January 14, 2000	Order setting aside the June 17, 1999, sale on the grounds it ". . . is so grossly inadequate as to shock the conscience of the Court . . ."
May, 2001	Carpenter's successor files motion for partition in-kind.
Aug./Sept., 2001	Conferences in Trial Court's chambers; counsel for Carpenter suggests a new price of $32/square foot.
January 11, 2002	Final Judgment of Partition entered reinstating the judicial sale of June 17, 1999, **but** setting a new price of $32 per square foot.

This time line illustrates the arbitrariness of the trial court's ultimate selection of a new price two and one-half years later. The higher price unilaterally suggested by Carpenter in chambers is the **only source** for the price established by the Final Order and Judgment of Partition. LF 612 and 613; Resp. Sub. Br. at 31-32. Respondents cite no authority wherein any trial court was permitted to do what was done here, i.e., set the price without conducting a lawful and contemporaneous judicial sale in the manner prescribed by Rule 96.

Respondents attempt to justify the Trial Court's failure to follow the plain language of Rule 96 by relying on the fact that: (1) the price suggested by Carpenter was a "ten fold" increase in his bid price, and (2) the trial court retains jurisdiction over interlocutory orders. Appellants do not dispute that Carpenter suggested the increase in price and that the Trial Court may, in general, alter its own interlocutory orders. However, partition of land in Missouri may only be done in compliance with Rule 96, as Missouri appellate courts have consistently recognized. *See Darrington v. George*, 982 S.W.2d 823 (Mo. App. W.D. 1998); *Vickers v. Vickers*, 762 S.W.2d 482 (Mo. App. E.D. 1988); *Forney v. Forney*, 926 S.W.2d 889 (Mo. App. E.D. 1996). Neither appellants nor respondents cite any authority to the contrary. App. Sub. Br. at 35-37 and Resp. Sub. Br. at 27-37.

2. Appellant Fredericks was prejudiced.

Respondents argue Fredericks was not prejudiced by the admitted deviation from Rule 96. First, Rule 96 does not contain a permissible exception if the party subjected to the partition sale "does really well." *See* Mo. R. Civ. P. 96.01 *et seq*. All Missouri

decisions to date require strict compliance with the rule for the simple reason that a property owner is being divested of property. Due process under the Missouri constitution requires no less because partition involves a property interest that is subject to protection, as discussed in appellants' Substitute Brief. Moreover, prejudice was properly raised and briefed at pages 39-40, and throughout Point I.

Second, there was no judicial sale, hearing, evidence, testimony or proceeding of any kind to consider the issue of how much Fredericks should be paid for a forced divesture of his ten percent (10%) interest in the property. On what authority or legal basis do respondents suggest that the price they selected is fair, and not prejudicial? The first price of $3.04/square foot in mid 1999 shocked the Trial Court's conscience. LF 491-94. The Trial Court also determined in early 2000 that it was "improvident to dispose of this property by judicial sale." LF 491-94. How, more than two years later, in chambers, can the Trial Court, (at the suggestion of the seller and moving party), divine a then current price that a contemporaneous judicial sale conducted as Rule 96 requires might bring? The Trial Court did not have any evidence before it that $32 was a fair price or that it was then "provident" to reinstate a sale that two years earlier had shocked its conscience. As noted in appellants' Substitute Brief, Carpenter did not believe four years earlier that $45 a square foot was a fair price for the property. App. Sub. Br. at 27. The Trial Court's selection of the $32 price was arbitrary and outside the boundaries of Rule 96. The procedure followed by the Trial Court neither followed Rule 96 nor substantially complied with the rule.

3. Appellant Fredericks interest was not *de minimus*

Respondents' argue that Fredericks only had a *de minimus* interest in the property so some undefined deviations are permissible. This position is unsupported by the facts or Missouri law. There is no authority for the proposition that a partition need not follow the requirements of Rule 96 if the property owner, whose interest is being divested, is below some threshold of value. The fact that respondent was willing to pay appellant Fredericks in excess of $100,000 for his ten percent interest also demonstrates that appellants interest was not *de minimus.*

4. Respondents' claim for attorneys' fees.

Appellants are unclear about the point being made in respondents' Substitute Brief concerning their request for attorney's fees. The Trial Court did not award respondents any fees and respondents have not filed a cross-appeal. Therefore, there is no issue before this Court with respect to respondents' comments concerning attorney's fees not awarded by the trial court and respondents are not entitled to any relief in this Court.

5. Chapter 528 applies and was not followed

Respondents contend that appellants failed to develop any argument relating to Chapter 528 and therefore abandoned this argument. This position demonstrates that respondents do not understand the relationship between Chapter 528 and Rule 96. However, appellants agree that no "future interests" are at issue on this appeal.

Chapter 528, beginning with Section 528.010, is the statutory scheme from which Rule 96 finds its basis. *See* Mo. R. Civ. P. 96.01 *et seq*. and Mo. Rev. Stat. §528.010 *et seq*. Section 528.010 allows a party with a future interest in land to maintain a cause of

action. Section 528.030 allows a tenant in common to maintain an action for partition. Mo. Rev. Stat. §528.030. As noted in Footnote 8 of appellants' Substitute Brief, Rule 96 and Chapter 528 are essentially identical. To any extent that Rule 96 and Chapter 528 may be inconsistent or in conflict, Rule 96 supersedes the statute because Rule 96 addresses practice, procedure or pleading in an action for partition. *See State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995). The statutory scheme applies to the situation now before this Court, as does Rule 96, and under these facts it makes no difference whether the Court interprets the statute or rule.

B. Carpenter's unclean hands bar him from obtaining the equitable remedy of partition in that Carpenter engaged in wrongful conduct and self-dealing with respect to the property sought to be partitioned, and refused to cooperate in and frustrated the sale of the partnership and tenancy-in-common property.

Respondents argue that the defense of unclean hands is not available in a partition claim as a matter of law, and that appellants failed to plead the affirmative defense with the Trial Court. The equitable defense of "unclean hands" was properly pled as set forth in App. Sub. Br. At 40 and LF 241-242. Respondents ignore what is clearly a matter of record. The interaction between the facts constituting unclean hands and the law are set out in appellants' Substitute Brief at 40-43.

Second, respondents incredibly argue that equitable principles do not apply to partition actions which are actions in equity. Resp. Sub. Br. at 38 and 39. Respondents fail to cite any authority in support of this proposition. Resp. Sub. Br. at 38-40.

Appellants refer this Court to the list of authorities, holding that equitable principles are applicable. App. Sub. Br. at 41. As noted there, this is a case overlaid with fiduciary duty issues and plain evidence of tortious conduct by the party seeking partition. The partition action was utilized by Carpenter as leverage. There is no Missouri law cited by respondents, and none found by appellants, that exclude partition actions from the full panoply of the equitable doctrine, and no appellate authority holding that unclean hands principles are inapplicable.

This Court should reverse and remand with instructions that the court administrator's deed in partition be set aside, and the partition claim dismissed.

II. The Trial Court erred in refusing to appoint a receiver, pursuant to Rule 68.02 of the Missouri Rules of Civil Procedure, because the judgment denying the appointment of a receiver was against the weight of the evidence in that the evidence demonstrated that a receiver was necessary to protect the jointly owned property of Fredericks and Carpenter and Carpenter was engaged in a bitter dispute with and had initiated multiple lawsuits against the remaining general partners and Broadway-Washington, had breached numerous fiduciary duties, engaged in extensive self-dealing, excluded his minority general partner from partnership affairs, and failed to disclose material partnership financial and other information.

Respondents' Brief advances a number of points under three headings. First, however, the standard of review must be addressed. Appellants noted in their Substitute Brief at 44-45, that while *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976) is the latest pronouncement by this Court of standards of appellate review, the older decision *State ex rel. Lund & Sager v. Mulloy*, 49 S.W.2d 1, 2 (Mo. 1932) articulated an abuse of discretion standard for appeals on receivership issues. Respondents do not address the point directly, but imply that "weight of the evidence" is the test. Whether abuse of discretion should remain the standard of review is for this Court to determine. In this case it makes no difference if the standard is "abuse of discretion" (as appellants urge),

"weight of the evidence" (as respondents suggest) or "error in applying or declaring the law", because under any of those tests, Judge Shinn erred in failing to appoint a receiver.[2]

A. Missouri Law Does Not Require That a Party Seeking Appointment of a Receiver First Prove a Cause of Action

Respondents argue that a trial court lacks authority to appoint a receiver absent "a viable cause of action under some theory of relief," citing *Price v. Bankers Trust Co.*, 178 S.W.745 (Mo. 1915). Resp. Sub. Br. at 40. This well aged decision obviously predates this Court's adoption of Rule 68 and the enactment of Mo. Rev. Stat. § 515.240, but is otherwise readily distinguishable because in *Price* a receivership application was made without any cause of action pled. 178 S.W. at 749-50. Here there are multiple causes of action that are available to support plaintiff/appellants' motions for a receiver.

If respondents' position were correct, then no trial court could appoint a receiver until it first made a determination that a "viable cause of action" existed. Rule 68.02 is not couched in such terms. It does not expressly or implicitly impose such a requirement although, appellants acknowledge, a successful motion to dismiss would resolve the matter; but that situation does not exist here. Rule 68.02 plainly states ". . .whenever in a

[2] Respondents quote one statement by Judge Shinn suggesting he "studiously" rejected all receiver requests, when in fact he declined to rule on multiple motions for receiver. Resp. Sub. Br. at 40. The record contains numerous comments by Judge Shinn relating to the receivership issue including, only three weeks before signing the interlocutory judgment, "I think I am going to appoint a receiver." 12/17/99 TR 9:9-10; 21:18-22:20.

pending legal or equitable proceeding it appears to the court that a receiver is necessary to keep, preserve and protect any business, business interest or property. . . the court may appoint a receiver . . .” Mo. R. Civ. P. 68.02. The words “whenever” and “pending” suggest that a trial court can and should act on a receivership request at any time. No fair reading of the rule imposes an obligation to first conclude some sort of “merits” decision-making process to determine that a “viable cause of action” exists. No doubt an opposing party could and ordinarily would point out the absence of a cause of action (with or without a contemporaneous motion to dismiss) and seek to avoid a receiver on that ground. But a plain reading of Rule 68.02 does not require, and this Court should not interpret it to impose, such a threshold determination requirement on trial courts. *Contra* Mo. R. Civ. P. 92.02. (showing required for temporary restraining order consists of “a verified petition or affidavit reciting the specific facts that support a showing of . . . immediate and irreparable injury, loss, or damage will result in the absence of relief”).

Respondents also claim “the cost of a receiver would have been a tremendous burden to the partnership.” Resp. Sub. Br. at 41. By such a standard any managing partner could steal from the partnership with impunity and avoid appointment of a receiver on the ground it would be “expensive.” Respondents cite no authority to support their argument, and there is none. Where grounds for a receiver are shown, Rule 68.02(c) provides that the trial court “shall allow the receiver reasonable compensation for his services to be charged upon such of the parties, or paid out of any [business before the court].” Mo. R. Civ. P. 68.02.

B. The Admitted and Undisputed Facts Establish a Joint Venture To Operate the Tenancy in Common Property as a Business

Respondents say the Trial Court found no joint venture existed with respect to the tenancy-in-common property at 12th & Broadway. Resp. Sub. Br. at 13, 41-42, and 48-50. On the admitted and undisputed facts, the evidence proved that a joint venture existed between Carpenter (whether wearing his hat as 90% owner of the tenancy in common property or as managing general partner of Broadway Washington) and Fredericks for operation of the tenancy in common property.

This Court has long recognized that a joint venture is simply a kind of partnership. *Grissum v. Reesman*, 505 S.W.2d 81, 85 (Mo. 1974). A joint venture may be formed by oral agreement or may be implied from the conduct of the parties creating profit sharing arrangements. *Id*. and authorities cited in App. Sub. Br. at 60, fn. 11. The primary criterion for determining the existence of a partnership is the intent of the parties to enter into such a relationship. *Fischer v. Brancato,* 937 S.W.2d 379, 382 (Mo. App. E.D. 1996). There is generally no essential difference between a partnership and a joint venture (*Grissum,* 505 S.W.2d at 86 (Mo. 1974)), and they are governed by the same legal rules. *Sarasohn & Co., Inc. v. Prestige Hotels Corp.,* 945 S.W.2d 13, 16 (Mo. App. E.D. 1997).

In this case, the key indicia of a joint venture are that: (1) a partnership already existed in Broadway-Washington where Carpenter was managing partner; (2) all parking lot revenue (net remitted from the third party operator each month) flowed into

Broadway-Washington's bank account, where the funds were commingled between monies owed Broadway-Washington and to the tenancy-in-common landowners; (7/16/98 TR 824:7-13; 907:4-911:23; 941:7-942:13); (3) before and after the tenancy-in-common arrangement was formed in 1991, Carpenter managed all aspects of the parking lot business; (7/16/98 TR 986:8-25); and, (4) Carpenter admitted that 10% of the net parking revenues were owed Fredericks' IRA as 10% owner of the tenancy-in-common property. *See* TX 16 ("we reflect [on the December 1992 BWA books] a credit (not distributed) of $460.37 to the account of your IRA as its share of the distribution attributable the 10% interest in the property at 12th and Broadway owned with Golden Gateway Building Company.").

Trial Exhibit 16 confirms Carpenter's admission of an agreed profit-sharing arrangement. The profit-sharing agreement and Carpenter's admission are prima facia evidence under Missouri law of the existence of a joint venture. *See* Mo. Rev. Stat. § 358.070(4) (providing that receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business). If Carpenter never intended to share profits from parking operations on the tenancy-in-common property, he as managing partner of Broadway-Washington had an affirmative duty to disclose that intent before selling the 10% interest to Fredericks. No such evidence of Carpenter disclosing this fact is found in the record.

These undisputed facts and admissions by Carpenter, against his interest, establish the operation of the parking lot business conducted on the tenancy-in-common property, and the 90/10 profit sharing arrangement, and are sufficient to establish that a joint

venture existed as a matter of law. *See* Mo. Rev. Stat. §358.060 (partnership is association of two or more persons to carry on as co-owners a business for profit). Respondents also argue that the Statute of Frauds precludes finding an oral joint venture. Resp. Sub. Br. at 49. That statute is inapplicable. *See Grissum,* 505 S.W.2d at 88-89. Further, Trial Exhibit 16 is a writing signed by Carpenter that would satisfy the statute of frauds in any event. The Trial Court's judgment is against the weight of the evidence and erroneously applies the law.

Respondents argue, contrary to fact, that Fredericks sought a receiver only over the "oral joint venture" and not over the tenancy-in-common property. Resp. Sub. Br. at 41. In fact, the initial motion by Sangamon and Fredericks in November 1997 requested a receiver to take charge of all "assets, income, expenses and accounts of Broadway-Washington Associates and the joint venture." LF 257. Similarly, the second request for a receiver in December 1997 (made at a time when Carpenter was stonewalling opportunities to sell after he had listed the property for sale) also sought a receiver to take charge of all the joint property, with authority to sell the property as part of winding up the parties' affairs, and to prevent ongoing stripping of cash from the business. LF 353-360. The third request for receiver in October 1999 was also broadly worded and was based on new evidence of Carpenter's misconduct and plundering. LF 445-460.

Then, after discovery of the secret confessed judgment by Carpenter of $224,000 against his own partnership, and it having been set aside for fraud, plaintiffs filed a fourth request for appointment of receiver in June 2001 based on that and other ongoing misconduct. The motion sought "a receiver to take possession of that certain real estate

held jointly by the parties for the purpose of preserving and protecting the business, business interests and properties and furthermore to wind down. . .” the business interests. LF 523-539. The pleadings and motions were not so impermissibly narrow that the Trial Court lacked authority to appoint a receiver.

C. Appellants Do Not Urge This Court to Adopt a New Standard for Mandatory Appointment of Receivers

Respondents do not quarrel with the proposition that trial courts should make receivership determinations promptly, though they laud Judge Shinn for failing to rule. Respondents do say however, that appellants urge a “bright line test” and a “mandatory” receivership requirement that would inappropriately strip trial courts of discretion. Resp. Sub. Br. at 42. Appellants do not contend that receiverships should be mandatory in all situations, or that trial courts should be deprived of or limited in their exercise of discretion in making receivership determinations. Neither do appellants urge this Court to adopt a “bright line test.” Appellants believe this Court should articulate useful guidelines for the trial courts to follow in the future as outlined in App. Sub. Br. at 52-53.

Respondents’ interpretation of Rule 68.02 would require trial courts to hold early hearings and/or mini-trials to determine whether a “viable cause of action” has been established, (whatever that means). This requirement would amount to a rewriting of Rule 68.02 and the imposition of a new condition precedent under Missouri law. Respondents’ new rule would impose unnecessary burdens on trial courts and invite delay tactics by mischievous managers who could, by protracting proceedings, maintain control of the business and undermine Rule 68.02’s very purpose. Delay in ruling on the

appointment of a receiver is not a means of advancing or implementing the remedy this Court envisioned in Rule 68.02 – as this case illustrates.

III. The Trial Court erred by entering judgment in favor of defendants on the claims for breach of fiduciary duty (counts three, eight and fifteen), conversion (counts nine and eighteen) and constructive trust (counts ten and nineteen), because the Trial Court's judgment was against the weight of the evidence in that the evidence established that Carpenter engaged in extensive self-dealing, excluded Fredericks from partnership affairs, refused to pay monies due to Fredericks and refused to cooperate in attempts to sell the property.

In response to appellants' claims against Carpenter for breach of fiduciary duties, conversion and constructive trust under Point Three, respondents raise essentially four (4) arguments:

A. Sangamon lacks capacity to sue derivatively and the Trial Court's Judgment is against the weight of the evidence;

B. Judgment against Fredericks' on his claims of conversion, breach of fiduciary duty and constructive trust are not against the weight of the evidence;

C. Judgment against Sangamon's on its claims of breach of fiduciary duty and constructive trust are not against the weight of the evidence; and,

D. No evidence of breach of fiduciary duty by respondents.

Appellants' breach of fiduciary duty claims are generally based on Carpenter, as the managing general partner, engaging in systematic self-dealing by paying himself (or his owned entities, one way or another) 100% of the cash generated by the two pieces of property being operated as a parking lot business. The Carpenter 1985 Family

Partnership, Ltd., the entity that was and is the managing general partner of Broadway-Washington was responsible for the breaches, as were other defendants, as outlined above. *See also* App. Sub. Br. at 13. Carpenter testified that he acted as Managing General Partner of Broadway-Washington. 7/16/98 TR 729:14-16.

It is undisputed that Carpenter utilized the Broadway-Washington bank account in managing the tenancy in common property. In doing so he also acted on behalf of Golden Gateway Building Co., at certain times, as the entity that held title to his 90% tenancy-in-common property. Later, he held that interest individually. Respondents concede these undisputed points and relationships. Resp. Sub. Br. at 12. In most but not all cases, Allan Carpenter was the individual who acted on behalf of each entity defendant. In the midst of all this, it cannot be said that Carpenter somehow escaped fiduciary duties owed to Fredericks with respect to his interest in the parking lot business. The other defendants are vicariously liable for Allan Carpenter's conduct, a point respondents do not dispute. The successor, Theodora D. Carpenter, is liable for Allan Carpenter's conduct with respect to the tenancy-in-common property.

A. Sangamon properly pled its claims derivatively and the weight of the evidence established that it was entitled to judgment for conversion.

Respondents argue Sangamon lacked capacity to sue derivatively because Mo. Rev. Stat. §359.571 and Mo. R. Civ. P. 55.13 require, *inter alia*, that a limited partner plead that general partners with authority to do so have refused to bring the action, or that an effort to cause those general partners to bring the action is not likely to succeed. Of

course, Sangamon as a general partner asserted direct claims of breach of fiduciary duty, conversion, etc., and sued derivatively as a limited partner. LF 1-62.

Appellants do not quarrel with the general rule for pleading derivative claims by limited partners, but appellants' pleadings adequately set forth appellants' claims sufficient to meet all requirements. LF 48-62. Paragraph 102 of the Second Amended Petition, incorporated by reference in the three derivative counts about which respondents now complain, specifically recites that Sangamon has not undertaken an effort to cause the Managing General Partner to assert this claim on behalf of Broadway-Washington Associates due to such an effort being not likely to succeed because:

> a. the claim is against the Managing General Partner itself and an affiliated entity for breaches of duties owed to Broadway-Washington Associates and other wrongful acts; and
>
> b. prior requests for actions directed to the Managing General Partner, as heretofore set forth in paragraphs 36 through 53, have been rejected.

LF 44, paragraphs 101, 102, LF 48, paragraphs 110. The foregoing pleading language satisfies all requirements of Mo. Rev. Stat. §§359.571 and 359.591, as well as Rule 55.13.

B. The Judgment against Fredericks' on his claims of conversion, breach of fiduciary duty and constructive trust are against the weight of the evidence and should be reversed.

Respondents argue (Resp. Sub. Br. at 47-48) that the weight of the evidence does not prove conversion because appellants' Brief only mentions decedent Carpenter as having converted partnership property. "Carpenter" as used throughout appellants' Substitute Brief is a defined term. (App. Sub. Br. at 11 n. 2)

Then respondents argue that Missouri conversion law only applies to specific chattels, not cash, the only exception being if Carpenter spent the money for purposes other than paying partnership debts. Resp. Sub. Br. at 48. Appellants have painstakingly shown how Carpenter paid himself monies to which he was not entitled. (App. Sub. Br. 19-25). The act of conversion was complete upon this taking. The authorities cited in App. Sub. Br. at 65-66 support appellants' point that a partner's unauthorized taking of partnership cash constitutes conversion.

Respondents also argue that no conversion was proven because it hinged upon a joint venture determination. Appellants at Point II (B), *supra*, outline the evidence establishing that a joint venture for operation of the tenancy-in-common property was shown as a matter of law. Taking all available partnership cash including 10% earmarked for Fredericks' IRA constitutes conversion. This Court should reverse on the basis that conversion was established.

Next respondents argue that the judgment on appellants' claim for constructive trust is not against the weight of the evidence. The test remains the same for each of plaintiff/appellants' legal theories and supporting facts, and the evidence will not be again summarized. Evidence supporting the establishment of a constructive trust was set forth at App. Sub. Br. at 66. *See also White v. Mulvania*, 575 S.W.2d 184, 187-189 (Mo. banc 1978) (recognizing that a constructive trust is available to one who has been denied his right to property because of the wrongful actions of another). Breach of fiduciary duty is also a form of fraud supporting imposition of a constructive trust. *Id*.; App. Sub. Br. at 61, for appellate cases cited. This Court should hold that a constructive trust is imposed on all monies taken by respondents for the benefit of Broadway-Washington and Fredericks.

C. The weight of the evidence established that Carpenter breached his fiduciary duties to Sangamon.

Perhaps the most outrageous conduct which establishes respondents' breach of fiduciary duty was the filing and prosecuting of the secret lawsuit against the Broadway-Washington Partnership, of which appellants were twenty-five (25%) per cent owners. This suit was filed in another division, without any notice to Fredericks, and while appellants and respondents were waiting the Trial Court's ruling on the same issues. Respondents attempt to justify this action because their counterclaim, before the Trial Court contained requests for money which respondent Carpenter claimed was owed him by Broadway-Washington. Resp. Sub. Br. at 62. Carpenter unilaterally decided he was owed money despite the partnership's prohibitions on payment to partners for services.

Carpenter also unilaterally decided he could sue his own partnership for that money. Carpenter, wearing his hat as president of Carpenter-Vulquartz Redevelopment Corporation, filed suit against Broadway-Washington and then wearing his hat as managing general partner of Broadway-Washington had his counsel consent to a $224,000 judgment, in his favor, and against his partnership, Broadway-Washington. All this was done without informing his partner, appellant Fredericks, during the time Judge Shinn had completed the bench trial and had taken the case under advisement. Ms. Smiley did not disclose the related "secret" action to allow Carpenter to obtain a $224,000 judgment to either Judge Shinn or Judge Daugherty.

The facts concerning the "secret lawsuit" are outlined in App. Sub. Br. at 22-23. The core facts include:

7/21/99	Petition in "secret lawsuit" filed.
8/16/99	Waiver of Service by Broadway-Washington, counsel Rhonda Smiley.
8/16/99	Broadway-Washington Answer signed by counsel Rhonda Smiley.
8/17/99	Stipulation and Confession of Judgment, $224,335. signed by Allan Carpenter and Rhonda Smiley.
8/18/99	Judgment entered in the sum of $224,335.

2nd Sup. LF 204-348.

With respect to Judge Daugherty's Order, (setting aside secret judgment), respondents incorrectly state that "Sangamon did not include a copy of that order in the

Legal File or Appendix." In fact, a copy of the Order is at appellants' Appendix A72-73. A certified copy is attached in appellants' Appendix to the Reply Brief A74-75. It is difficult to imagine conduct which was more misleading to the Trial Court, or which was a greater breach of fiduciary duty by a managing partner of a partnership.

Respondents do not question that fiduciary duties were owed Sangamon, nor do they argue the legal principles cited in appellants' Substitute Brief relating to those duties. Respondents attempt to justify their conduct on the grounds that Carpenter was entitled to take the money because the Broadway-Washington Partnership Agreement authorized it. Resp. Sub. Br. at 60-64.

Respondents have misstated this critical and dispositive evidence. The partnership agreement does not provide that the Managing General Partner's expenses will be reimbursed, and it does not authorize any of the payments at issue. See page 6 above with actual language of partnership agreement. The partnership agreement does not and cannot provide the legal basis for the admitted payment of all available cash flow to Carpenter.

The provision in the partnership agreement upon which respondents rely, as the only justification for Carpenter paying himself all the money, cannot withstand scrutiny. But to the extent there is any doubt, this seemingly clear language was drafted by attorneys chosen by Carpenter and any ambiguity must be construed against him as draftsman. Resp. Sub. Br. at 9. (Carpenter hired independent counsel from Pillsbury, Madison & Sutro in San Francisco, to draft a Missouri limited partnership agreement

regarding ownership of the property facing Broadway. The Pillsbury, Madison & Sutro firm also drafted the Management Agreement. App. Apx. A57).

Respondents also try to explain away Sangamon's claim for breach of fiduciary duties in Resp. Sub. Br. at 52-62, where they argue that the breach of fiduciary duty claim was narrowly pled and there "simply was no evidence that distributions were made to any Broadway-Washington partners. . ." *Id*. at 57. Respondents are incorrect in claiming that the breach of fiduciary duty counts were narrowly and exclusively set forth in paragraph 76 of the Second Amended Petition, as a complete review of appellants' Second Amended Petition demonstrates.

Respondents also allege that after the agreed sale of some Broadway-Washington property to Carpenter in 1989, he was entitled to 63% of the net parking lot revenue, and after Fredericks acquired a 10% interest in the 12th & Broadway property in 1991, Carpenter was entitled to receive 57% of the parking revenue. Resp. Sub. Br. at 57. Respondents do not cite to the record, and their assertions may be ignored. *See* Mo. R. Civ. P. 84.04(i). At best respondents state a half truth. The other facts are undisputed as summarized in App. Sub. Br. at 19-25. While Carpenter was arguably entitled to receive 57% of the parking revenue (attributable to his 90% ownership of the tenancy in common parcel), he in fact took 100%! This case is about the other 43% that he improperly paid himself.

D. The evidence of Carpenters' breach of fiduciary was not and is not limited to the allegations in Paragraph 76 of appellants' Amended Petition.

Respondents appear to allege that appellants' claims for breach of fiduciary duties are limited to only claims set forth in paragraph 76 of appellants' Second Amended Petition and/or the evidence at trial is limited to paragraph 76. (Resp. Sub. Br. at 55-65). Neither position is correct or properly before this Court. Respondents raise a number of arguments that Carpenter did not breach his fiduciary duties by addressing each sub-part of paragraph 76, and respondents appear to question what issues have been appealed.

Appellants have limited their appeal to this Court to the three (3) points relied on, i.e., reasons why the two judgments should be reversed and remanded for further proceedings, consistent with the orders of this Court. These three points include appellants claim that Carpenter breached fiduciary duties owed to appellants. Contrary to respondents unsupported allegations, the evidence at trial that Carpenter breached his fiduciary duties was not limited to allegations contained in paragraph 76. *See* Mo. R. Civ. P. 55.33 (providing that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."). Also the "secret lawsuit" discussed above occurred after the trial before Judge Shinn, and was presented to Judge Shinn by "renewed" motions to appoint a receiver, etc.

The weight of evidence presented at trial[3] established that Carpenter breached his fiduciary duties including but not limited to: (a) failing to provide an accounting to appellants (*See* Mo. Rev. Stat. §358.200); (b) failing to allow appellants access to partnership books and records (*See* Mo. Rev. Stat. §358.190); (c) failing to keep accurate books and records of the partnership (*Knopke v. Knopke*, 837 S.W.2d 907, 922 (W.D. Mo. 1992)); (d) refusing to disclose information about the prospective sale of partnership property (*See* Mo. Rev. Stat. §358.200); (e) making improper cash payments to himself or entities under his control; (f) filing a secret lawsuit and then confessing judgment against the partnership; and (g) engaging in improper self dealing.

At trial appellants presented evidence on each of these breaches by Carpenter as discussed thoroughly *supra* and in App. Sub. Br. at 60-66. Respondents never objected to any of the evidence of Carpenter's breach of fiduciary duties. Appellants appealed the

[3] Carpenter responds with he was somehow justified in suing the Partnership. Resp. Sub. Br. at 56. Carpenter is precluded by principles of *res judicata* and collateral estoppel from advancing such arguments. The California Court of Appeals affirmed a judgment in favor of Fredericks, in a San Francisco lawsuit (complaint at 2d Sup. L.F. 34-55) in which Carpenter advanced all these and other theories of wrongdoing by Fredericks. 2d Sup. L.F. 6-13, 146-167 (opinion). This is undisputed. *Lay v. Lay*, 912 S.W.2d 466, 471-472 (Mo. en banc 1995). This point was briefed in the trial court at 2d Sup.L.F. 19-57, 211. A chart summarizing the parallel allegations by Carpenter in both the San Francisco and Kansas City lawsuits appears at 2d Sup. L.F. 308-314.

Trial Court's Order granting judgment in favor of Carpenter on appellants' claim for breach of fiduciary duty as set forth in Point III. The weight of the evidence at trial, and properly before this Court, establishes that Carpenter breached his fiduciary duties and the judgment of the Trial Court should be reversed.

CONCLUSION

For the reasons set forth herein this Court should:

1. Reverse the Final Judgment and Order of Partition and remand with directions to set aside the Court Administrator's Deed in Partition and dismiss Count One of the Counterclaim or, in the alternative to conduct any further partition in accordance with Rule 96.
2. Reverse the Final Judgment denying application for appointment of a receiver, and remand with directions to the Trial Court to appoint a receiver with the power to sell the parties' Block 105 Properties, and to wind up the affairs of Broadway-Washington Associates and the relationships created in the tenant in common properties, pursuant to procedures to be established by and under the supervision of the Trial Court.
3. Reverse the Final Judgment and remand with directions to find the defendants appellants breached their fiduciary duties, converted monies rightfully belonging to Broadway-Washington Associates and Fredericks, hold the same in constructive trust and conduct further proceedings to establish the amounts properly due and owing.
4. Direct the Trial Court to conduct any and all further proceedings consistent with the forgoing.
5. Award appellants their costs herein.

Respectfully submitted,

Frederick H. Riesmeyer, II MO #26062
William P. Denning MO #52869

SPRADLEY & RIESMEYER

A Professional Corporation
Belletower Building, Suite 210
4700 Belleview
Kansas City, MO 64112
816/753-6006
FAX: 816/502-7898

Attorney for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing, along with a floppy disk containing same, was served this 25th day of March, 2005, on: Rhonda Smiley, Esq., The Skelly Building, 605 W. 47th Street, Suite 350, Kansas City, MO 64112-1905; and W. Edward Reeves, Esq., Ward & Reeves, 711 Ward Avenue, P.O. Box 169, Caruthersville, MO 63830, Attorneys for: The Carpenter 1985 Family Partnership, Ltd., Carpenter-Vulquartz Redevelopment Corporation, the Marital Community Property of Allan R. and Theodora D. Carpenter, Allan R. Carpenter, The Carpenter 427 West 12th Street Partnership, Ltd., Broadway-Washington Associates, Ltd., Golden Gateway Building Company, Dupage Properties, Inc., St. Francis Associates, L.P., Fleishhacker Properties and Mortimer Fleishhacker by sending a copy via: ☐ U.S. Mail, postage pre-paid; ☐ Fax; ☐ e-mail; ☐ Federal Express; ☐ Hand-delivery.

Attorney for Plaintiffs/Appellants

CERTIFICATE PURSUANT TO RULE 84.06(b)

The undersigned, attorney for appellant, hereby certifies that this Substitute Reply Brief complies with Mo. R. Civ. P. 55.03, the limitations contained in Rule 84.06(b), contains 7,222 words and 611 lines of type, as reported by counsel's word processing program, and that all disks and/or CDs filed or served with the brief were scanned for viruses with Norton anti-virus and are virus free according to that program.

_____

Frederick H. Riesmeyer, II MO #26062

APPENDIX INDEX